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Supreme Court, U.S.
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No. 02-479

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2002

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MEDICAL BOARD OF CALIFORNIA,
Petitioner

v.

MICHAEL J. HASON,
Respondent

---

**MOTION OF MICHAEL J. HASON, RESPONDENT, TO PROCEED *IN FORMA PAUPERIS***

The respondent, Michael J. Hason, asks leave to proceed *in forma pauperis* and to file the attached Brief in Opposition to Petition for Writ of Certiorari. Dr. Hason filed this lawsuit *pro se* in the United States District Court for the Central District of California. After the suit was dismissed by the District Court, he filed a *pro se* appeal to the United States Court of Appeals for the Ninth Circuit. Dr. Hason was granted *in forma pauperis* status in both the District Court and in the Court of Appeals.

The Ninth Circuit pursuant to 28 U.S.C. §1915(e)(1), appointed Erwin Chemerinsky to represent Dr. Hason in briefing and arguing the case. Erwin Chemerinsky, a member of the Bar of this Court, has agreed to continue to

represent Dr. Hason, without charge, through the remainder of the proceedings concerning this matter. No affidavit is attached because the United States Court of Appeals appointed counsel in this matter.

Respectfully submitted,

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Certificate of Service

I, Erwin Chemerinsky, a member of the Bar of this Court, hereby certify that on the 16th day of October 2002, three copies of the **MOTION OF MICHAEL J. HASON TO PROCEED *IN FORMA PAUPERIS*** were mailed, first class postage prepaid, to:

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Eleventh Amendment bars suit against the California Medical Licensing Board pursuant to Title II of the Americans with Disabilities Act for discrimination based on disability.

2. Whether the California Medical Licensing Board's discrimination based on disability in granting a medical license violates Title II of the Americans with Disabilities Act which prohibits the government from discriminating against the disabled in its "services, programs or activities."

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## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Michael J. Hason hereby opposes the Petition for a Writ of Certiorari by the Medical Board of California to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

Respondent adopts and incorporates by reference all opinions and orders below that are set forth in Appendices A through F to the Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

Dr. Michael J. Hason, applied for a license to practice medicine in California in March 1995. After three years of consideration, in April 1998, the California Medical Board denied Dr. Hason's application for a medical license based on his prior history of depression. Dr. Hason filed a *pro se* complaint in federal district court on April 21, 1999, alleging that he was impermissibly discriminated against based on his disability in violation of his rights under the United States Constitution and the Americans with Disabilities Act. Dr. Hason named as defendants the Medical Licensing Board of California and several officials and officers of the Medical Licensing Board. Dr. Hason sought both damages and injunctive relief.

On February 1, 2000, the United States Magistrate Judge issued a Report

and Recommendation. The Magistrate Judge recommended dismissal of Dr. Hason's complaint on two grounds. First, the Magistrate Judge said that the claims against state officers and state agencies for injunctive and damages relief were barred by the Eleventh Amendment. Report and Recommendation of the Magistrate Judge, pp. 2-3 (Appendix D to the Petition for Writ of Certiorari). The Magistrate Judge ruled that state officers may not be sued for injunctive relief and said that the Eleventh Amendment bars "plaintiff's federal civil rights claims against those defendants to the extent that the plaintiff is seeking injunctive relief." *Id.* The Magistrate Judge also ruled that the State government may not be sued for violating Title II of the Americans with Disabilities Act. Second, the Magistrate Judge said that there is not a cause of action under Title II for discrimination based on disability in issuing a medical license.

On March 31, 2000, the United States District Court, without a written opinion, issued an Order Adopting Findings, Conclusions, and Recommendations of United States Magistrate Judge. (Appendix C to the Petition for Writ of Certiorari).

The United States Court of Appeals for the Ninth Circuit reversed the District Court and held that Title II may be used to sue the state because it is an appropriate exercise of Congress's power under section five of the Fourteenth

Amendment. The court also ruled that state officers may be sued for injunctive relief pursuant to §1983.[1] Additionally, the court held that medical licensing is a "service, program, or activity" within the scope of Title II of the Americans with Disabilities Act and thus that Dr. Hason stated a claim upon which relief could be granted. (Appendix A to the Petition for Writ of Certiorari).[2]

The State of California sought *en banc* review in the United States Court of Appeals for the Ninth Circuit. On June 26, 2002, the Ninth Circuit denied the request for *en banc* review. (Appendix E to the Petition for Writ of Certiorari).

## REASONS THE PETITION SHOULD BE DENIED

### I. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CORRECTLY APPLIED CLEARLY ESTABLISHED PRINCIPLES IN HOLDING THAT THE CALIFORNIA MEDICAL LICENSING BOARD COULD BE SUED FOR VIOLATING TITLE II OF THE AMERICANS WITH DISABILITIES ACT

The Petitioner, the California Medical Licensing Board, is obviously correct

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[1]The State understandably is not seeking certiorari on the Ninth Circuit's holding that state officers may be sued for injunctive relief under *Ex parte Young* 209 U.S. 123 (1908).

[2]The Court of Appeals also ruled that the claims for damages against the officers in their individual capacities were properly dismissed for failure of service of process. Therefore, Dr. Hason's recovery of damages rests entirely on his claim against the Medical Licensing Board, pursuant to Title II of the Americans with Disabilities Act, which is the focus of the Medical Licensing Board's Petition for a Writ of Certiorari.

in identifying a split among the circuits concerning whether state governments may be sued for violating Title II of the Americans with Disabilities Act. *See, e.g., Wessell v. Glendening*, 2002 WL 31121398 (4th Cir. Sept. 26, 2002) (states may not be sued for violating Title II); *Kiman v. New Hampshire Department of Corrections*, 301 F.3d 13 (1st Cir. 2002) (states may be sued for violations of Title II in cases in which the court "identifies a constitutional violation by the state"); *Klingler v. Director, Department of Revenue*, 281 F.3d 776 (8th Cir. 2002) (states may not be sued for violating Title II); *Garcia v. S.U.N.Y. Health Sciences*, 280 F.3d 98 (2d Cir. 2001) (states may be sued for violations of Title II only if there are allegations of discriminatory animus against the disabled); *Thompson v. Colorado*, 278 F.3d 1020 (10th Cir. 2001), *cert. denied*, 122 S.Ct. 1961 (2002) (states may not be sued under Title II); *Popovich v. Cuyoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (en banc), *cert. denied*, 70 U.S.L.W. 3656 (October 7, 2002) (states may be sued under Title II for due process violations, but not for equal protection violations); *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001) (states may not be sued).

However, review is unnecessary in this case because the Ninth Circuit correctly applied this Court's precedents in holding that the Medical Licensing Board may be sued for violating Title II of the Americans with Disabilities Act.

In its most recent decision concerning sovereign immunity, *University of Alabama v. Garrett*, this Court said that it was applying "now familiar principles." 121 S.Ct. 955, 963 (2001). Specifically, the Court said in assessing the validity of "§5 legislation reaching beyond the scope of §1's actual guarantees," the legislation "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* at 963 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

In *Dare v. California,* the Ninth Circuit undertook *exactly* this analysis and unequivocally concluded that Title II of "the ADA the ADA was a congruent and proportional exercise of Congress's enforcement powers under §5 of the Fourteenth Amendment that abrogated Eleventh Amendment immunity." 191 F.3d 1167, 1175 (9th Cir. 1999), *cert. denied*, 121 S.Ct. 1187 (2001). *Dare* was decided after the Supreme Court's rulings in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *Florida Prepaid Postsecondary Expense Education Board v. College Savings Bank*, 527 U.S. 627 (1999), clarified the law with regard to Congress's power to override the Eleventh Amendment and its authority under §5 of the Fourteenth Amendment.

In this case, the United States Court of Appeals for the Ninth Circuit followed its precedents, *Clark v. California*, 123 F.3d 1267, 1270-71 (9th Cir.

1997) and *Dare v. California*, and held that the State Medical Licensing Board could be sued for discrimination based on disability. The Medical Licensing Board contends that the Supreme Court's decision in *Garrett* undercuts these Ninth Circuit decisions. *Garrett* does nothing of the sort. In *Garrett*, at the outset of the majority opinion, this Court expressly stated that it was not considering the constitutionality of Title II because it "has somewhat different remedial provisions from Title I." 121 S.Ct. at 960 n.1. Moreover, in *Garrett*, this Court contrasted the lack of a documented history of discrimination in employment by the states (the focus of Title I), with the Congressional record detailing discrimination by the states in providing public services (Title II). Id. at 966 & n.7.

Title II differs from Title I in four significant respects. First, Congress made express findings of persistent discrimination in "public services." Unlike employment, where Congress made a finding about private employment, but no analogous finding for public employment, 121 S.Ct. at 966, in the text of statute itself Congress made express findings of persisting discrimination in "education, . . . institutionalization, . . . voting, and access to public services." 42 U.S.C. §12101(a)(3). The same Committee Reports that the Court in *Garrett* found lacking with regard to public employment are directly on point in finding government discrimination with regard to public services. *See* S. Rep. No. 116,

101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28 (1990).

Second, Congress's findings were based on an extensive record of unconstitutional state conduct regarding people with disabilities in the areas covered by Title II, a record more extensive than existed for employment alone. The Ninth Circuit, in *Dare*, relied on this record in concluding that Title II is a constitutional exercise of Congress's section five power because of the documented pattern of pervasive constitutional violations. 191 F.3d at 1175.

Third, unlike Title I, which was intended simply to redress violations of the Equal Protection Clause as applied to a non-suspect class in an area (employment) not otherwise subject to heightened scrutiny, the range of constitutional violations implicated by Title II extends to areas where heightened judicial scrutiny is appropriate. Title II governs all the operations of a State, which plainly encompasses state conduct subject to a number of other constitutional limitations embodied in the First, Fourth, Fifth, Sixth, Seventh, Eighth Amendments and incorporated and applied to the States through the Fourteenth Amendment. These rights include the right to vote, to access the courts, to petition officials for the redress of grievances, to be accorded due process by law enforcement officials, and to humane conditions of confinement.

Finally, the remedy enacted by Congress is more proportional and congruent to this record of violations than the record discussed in *Garrett*. Title II targets discrimination that is unreasonable. The States retain their discretion to exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability or for no reason at all. Title II also permits discrimination if a person cannot "meet[] the essential eligibility requirements" of the governmental program or service. 42 U.S.C. 12131(2). But once an individual proves that she can meet all but the non-essential eligibility requirements of a program or service, the government's interest in excluding that individual "by reason of such disability," 42 U.S.C. 12132, is both minimal and, in light of history, constitutionally problematic. At the same time, permitting the States to retain and enforce their essential eligibility requirements protects their legitimate interests in selecting and structuring governmental activities. Title II thus carefully balances a State's legitimate operational interests against the right of a person with a disability to be judged "by his or her own merit and essential qualities." *Rice v. Cayetano*, 120 S. Ct. 1044, 1057 (2000). It is exactly for this reason that the Ninth Circuit found that Title II is a constitutional exercise of Congress's powers under section five of the Fourteenth Amendment.

## II. BECAUSE THERE IS NO SPLIT AMONG THE CIRCUITS AND BECAUSE THE NINTH CIRCUIT CORRECTLY FOLLOWED CLEARLY ESTABLISHED LAW, THIS COURT SHOULD NOT GRANT REVIEW AS TO WHETHER DENYING A MEDICAL LICENSE BASED ON DISABILITY IS ACTIONABLE UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT

Title II of the Americans with Disabilities Act provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132(2). Dr. Hason's complaint alleges that he was denied a medical license because of a mental disability, specifically his prior bouts of depression. Dr. Hason's complaint alleges that his depression has been successfully treated and that he is thus able to perform as a doctor.

The United States Court of Appeals for the Ninth Circuit ruled that there is a cause of action under Title II of the Americans with Disabilities Act for discrimination against the disabled in medical licensing. In reaching this conclusion, the court applied the literal language of Title II, its broad remedial purposes, and well established law to conclude that discrimination based on disability in medical licensing is prohibited by Title II of the Americans with Disabilities Act.

This holding does not conflict in any way with the decisions of any other Circuit. No other Circuit has yet ruled on the issue. The Medical Licensing Board, in its Petition for a Writ of Certiorari, identifies only one district court decision which is contrary to the Ninth Circuit's holding. *Alexander v. Margolis*, 921 F.Supp. 482 (W.D. Mich. 1995), *aff'd on other grounds*, 98 F.3d 1341 (6th Cir. 1996). In light of the absence of any split in the circuits, this is not an issue which the Supreme Court should address at this time.

Title II prohibits the government from discriminating in "services, programs, or activities." Issuing medical licenses obviously fits within this description. The Court of Appeals properly concluded that "the magistrate judge's narrow construction of the phrase 'services, programs, or activities,' is at odds with the remedial goals underlying the ADA. Courts must broadly construe the language of the ADA broadly in order to effectively implement the ADA's fundamental purpose of 'providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'" *Hason v. Medical Board of California*, 279 F.3d 1167, 1172 (9th Cir. 2002) (citations omitted).

Nothing in Title II or its legislative history provides any basis for excluding medical licensing from its scope. The Court of Appeals followed its prior

decision in *Zimmerman v. Oregon Department of Justice*, 170 F.3d 1169 (9th Cir. 1999), and concluded that Title II applies because licensing is an "output," a "service" provided by the State. The court explained: "Viewed in light of the *Zimmerman* framework, medical licensing is an output of a public agency, not an input such as employment. The act of licensing involves the Medical Board (i.e. a 'public agency') providing a license (i.e. providing a 'service') to an applicant for a medical license." 279 F.3d at 1172.

Because there is no split among the circuits on this issue and because of the strong basis for the Court of Appeal's decision in the text and history of the Americans with Disabilities Act, certiorari should not be granted on this issue.

## Conclusion

For the foregoing reasons, respondent Michael J. Hason urges this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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